No. 83-1409

In The
Supreme Court of the United States
October Term, 1983

BERGEN PINES COUNTY HOSPITAL,
Appellant,

vs.

NEW JERSEY DEPARTMENT OF HUMAN SERVICES, ANN KLEIN, COMMISSIONER; NEW JERSEY DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES; THOMAS M. RUSSO, DIRECTOR; NEW JERSEY DIVISION OF HEALTH ECONOMICS; JAMES HUB, DIRECTOR,
Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEES TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM JUDGMENT

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QUESTIONS PRESENTED

1) Does the Court have jurisdiction over this case since it was dismissed by the State courts as untimely under the rules of practice governing the courts of the State of New Jersey?

2) Is a substantial federal question raised by the dismissal of the claims of appellant as untimely?

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Pursuant to Rule 16, Paragraphs 1 (b) and 1 (c), of the Revised Rules of this Court, appellees move that this appeal be dismissed or, alternatively, that the judgment of the Supreme Court of New Jersey be affirmed.

STATEMENT OF THE CASE

On November 17, 1980, appellant, a county owned and operated nursing home, filed a notice of appeal with the Appellate Division of the Superior Court of New Jersey, wherein, among other things, appellant requested that damages be awarded in the form of retroactive increases

in its Medicaid per diem rate of reimbursement. Appellant's claim was based on its allegation that the former reimbursement system, which had been discarded effective January 1, 1978, had not been in compliance with the former federal requirement that long-term care facilities (LTCFs), or nursing homes, be reimbursed on a "reasonable cost related basis" (42 U.S.C. §1396 a(a) (13) (E) (1972) amended by Pub.L. 96-499, §962, 94 Stat. 2599 (Eff. October 1, 1980)) for services rendered to Medicaid recipients.

Pursuant to N.J.S.A. 30:4D-1 *et seq.*, the State of New Jersey has participated in the Medical Assistance Program (Medicaid) established by Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*, and jointly funded by the State and Federal governments. Although the program is primarily administered by the State, it is done so in accordance with Federal guidelines and requirements under Title XIX. *Harris v. McRae*, 448 U.S. 297, 301 (1980).

With regard to the payments for nursing homes, in 1972 Congress amended Title XIX of the Social Security Act to require that a State Plan for medical assistance provide as follows:

> effective July 1, 1976, for payment of the skilled nursing and intermediate care facility services provided under the plan on a reasonable cost related basis, as determined in accordance with methods and standards which shall be developed by the State on the basis of cost-finding methods approved and verified by the Secretary. [Pub.L. 92-603, Social Security Amendments of 1972, §249(a), 42 U.S.C. §1396a(a) (13) (E) (1972)].

Regulations promulgated by HHS postponed the effective date for implementation of the reasonable cost related methodologies to January 1, 1978. 45 C.F.R. §250.30(a)(3)(iv) (1976), 41 F.R. 27300 (July 1, 1976); but see, *Alabama Nursing Home Ass'n. v. Califano,* 433 F.Supp. 1325, 1330-1331 (M.D. Ala. 1977) (holding such regulation to be invalid insofar as it sets an effective date other than July 1, 1976).

In order to comply with this Federal requirement, the Division of Medical Assistance and Health Services (DMAHS) implemented a new method of calculating the per diem rates of reimbursement for nursing homes on July 1, 1976 (J.S. App. at 17a to 40a). Primarily, this new methodology, or pre-CARE system,* utilized the reported costs of the participating facilities to develop prospective rates of Medicaid reimbursement. For some cost areas, such as administrative or room and board, a statewide weighted average was used and an LTCF was eligible for reimbursement of costs in each category up to the appropriate average plus 10%. Nursing hours were reimbursed by utilizing a complicated standard deviation method while other costs centers, such as non-legend drugs, medical director and oxygen, were reimbursed at a flat fixed rate per day. Plant operations (maintenance and utilities), other health care and other miscellaneous expenses were reimbursed at a rate equal to the actual costs reported by the facility.

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*This methodology has been referred to as the "pre-CARE system" in the decision of the Appellate Division and various documents filed with the courts since the successor system is known as the Cost Accounting and Rate Evaluation (CARE) system.

With regard to the governmental facilities, such as appellant, the cost methodology utilized was the same as that utilized for the proprietary and voluntary non-profit facilities. In establishing the cost ceilings for those centers which were subject to a weighted average, i.e., administrative and general, room and board, recreation costs and medical supplies, and nursing costs, the expenses reported by the governmental facilities were not utilized to establish the reimbursement ceilings. This exclusion was based upon conclusions drawn by the Bureau of Audits, DMAHS, regarding the lack of adequate documentation provided by these facilities to justify the expenses incurred. This problem was one of long-standing concern and to a great degree resolved around the inability of these governmental facilities to properly allocate the costs necessary and attributable to the LTCF operation apart from other costs of operation. Additionally, the figures reported by the governmental facilities on their 1975 cost studies had demonstrated that their reported costs were exclusively high and out of sync with the overall industry.

On July 29, 1976 appellant was notified of its final rates to be utilized for payment purposes beginning July 1, 1976 (J.S. App. at 41a to 42a). The finality of these rates were reinforced by the inclusion of the following paragraph describing the audit process:

> These rates are subject to a future on-site audit. The estimated cost of providing federally mandated services (i.e. Medical Director and Social Services) have been included in the reimbursement effective July 1, 1976 on the assumption that facilities have or will immediately implement these services. *If it is determined upon field audit that facilities have not implemented these services in a timely manner, amounts re-*

> *imbursed for these services will be subject to retroactive recovery in whole or in part.* [J.S. App. at 42a].

Appellant did not appeal this rate determination to the courts after receiving this notice. Appellant eventually did contact DMAHS with regard to a pending audit of Medicaid expenditures to the facility (J.S. App. at 43a to 44a). However, by way of letter dated January 4, 1978, appellant was informed that (1) the purpose of the audit was not to establish per diem reimbursement rates, and (2) that the per diem reimbursement rates had been reviewed and that there was no basis for increasing the rate (J.S. App. at 45a to 46a).

The letter further noted that appellant received the maximum 110% of the weighted average for the administrative and general and room and board cost centers but that nevertheless appellant's costs exceeded this maximum by $5.80 per diem *(Ibid.)*. Similarly, although appellant received the maximum allowable amount under the nursing hours model, its costs exceeded the model by $7.59 a day (*Ibid.*). Thus, the State concluded that the reimbursement methodology did not allow for any further increases in appellant's per diem *(Ibid.)*. Appellant did not file an appeal from this letter reiterating the final rates established on July 29, 1976.

On November 17, 1980, in conjunction with the present appeal, appellant for the first time appealed its per diem rates of reimbursement utilized under the pre-CARE system, notwithstanding the fact that use of the methodology and the rates established under it had ceased as of December 31, 1977 with the advent of a new system, or the fact

that the federal statute had been amended to remove the "reasonable cost related basis" requirement. Pub.L. 96-499, §962, 94 Stat. 2599 (Eff. October 1, 1980).

In its review of the case, the Appellate Division of the Superior Court dismissed the appeal of the pre-CARE rates as untimely in the following manner:

> As an initial matter, *we hold that petitioner's appeal from the pre-CARE rates of July 1976 through December 1977 is long out of time and will not now be considered.* The administrative action appealed from is DMAHS's setting of the final pre-CARE reimbursement rates, which took place on July 29, 1976. The latest arguable date would have been January 4, 1978, when the agency refused to increase those rates. *This was more than two and a half years before the notice of appeal was filed.* Because no administrative appeal process existed during the pre-CARE period, petitioner should have appealed directly to this court within 45 days. R. 2:4-1(b). See *Alberti v. Civil Service Com.*, 41 N.J. 147, 154 (1963). It did not do so. Accordingly petitioner's appeal from the rate period preceding January 1, 1978 is out of time and therefore is dismissed. [J.S. App. at 14a (emphasis supplied)].

Appellant sought review of this dismissal by way of both notice of appeal and petition for certification to the Supreme Court of New Jersey. On October 24, 1983, the Supreme Court of New Jersey ordered the petition for certification denied and the appeal dismissed (J.S. App. at 8a to 9a).

ARGUMENT

Point I.

Since the dismissal of the case was based upon an adequate nonfederal basis and the federal question sought to be reviewed was not timely raised nor expressly passed on, the appeal should be dismissed.

Under the rules governing the practice of law in New Jersey, appeals from decisions or actions of state administrative agencies must be taken within 45 days from the date of service of the decision or notice of the action taken. N.J. Court Rules, R. 2:4-1(b). Due to the failure to comply with this rule, appellant's appeal of its per diem rates for the period between July 1, 1976 through December 31, 1977 was properly dismissed for failure to appeal within time.

By way of a letter dated July 29, 1976, appellant was notified of the "*final rates* established for your facility, effective July 1, 1976" (J.S. App. at 41a (emphasis supplied)). This notification was in keeping with the information provided by the State at a meeting with governmental facility representatives, including appellant's controller, whereby the facility representatives were informed that the rate established by the Bureau of Audits would be final. Thus, appellant had to appeal this final agency determination establishing its rate within 45 days of July 29, 1976. Since appellant did not file its appeal until November 17, 1980, the appeal of the rates for the July 1, 1976 to December 31, 1977 reimbursement period was correctly dismissed.

Furthermore, appellant's argument that it was awaiting an audit before appeal was properly considered and rejected by the Appellant Division.* In a prospective rate setting system, as is present here, the rates are not subject to upward adjustment due to a cost audit conducted at a later date. Rather, the audit is conducted to determine that (1) only proper cost items applicable to medicaid services were included and (2) those expenses claimed were reasonable. 42 C.F.R. §447.292(b) (3) (removed and revised 46 F.R. 47964 (Sept. 30, 1981)). Appellant was twice notified, by way of letters dated July 29, 1976 and January 4, 1978, of this purpose of the audit and that it would not establish per diem rates. Nevertheless, appellant failed to appeal prior to November 17, 1980.

Appellant can cite no valid reasons for its failure to appeal the rates set for the July 1, 1976 reimbursement period. Failure to appeal within the period prescribed by court or agency rule forever bars appellant from seeking further relief. See, *Alberti v. Civil Service Com.*, 41 N.J. 147, 154, 195 A.2d 297, 301 (1963). "Regardless of the degree of invalidity charged," appeal and review is subject to the prescribed time limitations. *Kent v. Borough of Mendham*, 111 N.J. Super. 67, 75, 267 A.2d 73, 77 (App. Div. 1970). Exceptions to the time limitations imposed by court rules, and by extension by agency regulations, for appeal and review should be "but exceptionally condoned,

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*Since this allegation had been raised before the court below and rejected, appellant's request for a hearing under *Lopez v. Swyer*, 62 N.J. 267, 300 A.2d 573 (1973), is illogical (J.S.B. at 26). Appellant presents no new or different reasons for its failure to appeal than those previously presented to and rejected by the Appellate Division.

and only in the most persuasive circumstances." *Id.* 111 N.J. Super. at 76, 267 A.2d at 77.

It is axiomatic that the Supreme Court will not review State court decisions which rest on adequate nonfederal grounds. *Radio Station WOW v. Johnson,* 326 U.S. 120, 129 (1945). Failure to present a federal question in accordance with the State rules of procedure constitutes an adequate and independent nonfederal ground barring further review, unless the appellant were able to demonstrate that the State has no legitimate interest in enforcing the rule. *Michigan v. Tyler,* 436 U.S. 499, 512 n.7 (1978); *Henry v. Mississippi,* 379 U.S. 443, 447 (1965); see also, *Safeway Stores v. Oklahoma Grocers,* 360 U.S. 334, 342 n.7 (1959); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969).

The barring of claims filed 2½ years out of time serves legitimate State purposes. First, it eliminates the necessity of the State courts being faced with stale claims growing out of long past transactions or occurrences for which witnesses or other evidence may not be available. Second, in a case such as this, the procedural limitation serves as a rule of repose serving the public's interest in a finding supporting the finality of the rate established on July 29, 1976 and the methodology utilized to set that rate. Utilizing the pre-CARE reasonable cost related methodology, LTCFs were reimbursed $72,834,297 between July 1 and December 31, 1976 and $150,852,981 for calendar year 1977 thus resulting in a grand total of ***$233,687,278 in State and Federal reimbursement paid under this system.*** State of New Jersey, Department of Human Services, Division of Medical Assistance and Health Services, *1977 Medicaid*

Annual Report. Not only is finality necessary to allow for the orderly governance of the regulated field, but verification of the services rendered or costs incurred by appellant and other nursing homes should these rates be reopened is exceedingly difficult, if not impossible.

Additionally, the State's, and by extension the taxpayers' of New Jersey, reliance on the finality of these rates is self-evident. By statute and constitution, Medicaid expenditures are limited to the amounts which were appropriated for each fiscal year. N.J.S.A. 30:4D-2; N.J. Const. Art. VIII, §II, par. 2.* Thus, no appropriations remain upon which to draw for reimbursement of appellant's claims. In like vein, the Federal taxpayers, who shared equally in the costs of reimbursing appellant and the other participating nursing homes during 1976 and 1977, have a similar legitimate economic interest in the dismissal of appellant's untimely claims in accordance with the general rules of practice of the State of New Jersey.

> Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. When as here there can be no pretense that the State Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong . [*Wolfe v. State of North Carolina*, 364 U.S. 177, 195 (1960)(citations omitted)].

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*"No money shall be drawn from the State Treasury but for appropriations made by law."

Here, the courts below analyzed the facts and circumstances surrounding the appeal of appellant's rates set by the pre-CARE system and found appellant's appeal to be "long out of time." Given the fact that the appeal was filed on November 17, 1980 from State agency action taken on July 29, 1976, this characterization of the appeal by the Appellate Division was obviously correct and was properly sustained by the Supreme Court of New Jersey. Since the dismissal of the case was based upon an adequate nonfederal ground of procedure, and the courts below never passed on the federal question, the Supreme Court should dismiss the matter for lack of jurisdiction.

Point II.

The Federal Question Raised Is Not Substantial.

The federal question raised in this case concerns the allegation by appellant that the method of reimbursing nursing homes in New Jersey between July 1, 1976 and December 31, 1977 was not in compliance with the federal requirements governing the Medicaid program. However, the State methodology was discarded on January 1, 1978. Similarly, the federal requirements, as noted previously, were changed on October 1, 1980 and the "reasonable cost related basis" requirement relied upon by appellant to form the federal question was eliminated prior to the institution of this suit. Pub.L. 96-499, §962, 94 Stat. 2599 (Eff. October 1, 1980). Thus the federal question concerning the compliance of the State of New Jersey with the federal requirements of Title XIX governing nursing home reimbursement was moot before the original appeal was filed. Hence, the dismissal of this moot claim as untimely gives rise to no substantial federal question requir-

ing review by this Court and the dismissal should be affirmed.

Moreover, the underlying claim for increased reimbursement raised by an individual nursing home against the single State agency administering the Medicaid program gives rise to no substantial federal question. There are no allegations of continuing noncompliance with Federal regulations or requirements. Hence, the Federal question, if one is considered to be raised, is in reality a request for damages presenting no substantial constitutional or other federal claim for which review is necessary. Therefore, the decision of the Supreme Court of New Jersey should be affirmed.

CONCLUSION

Is is respectfully urged that for the foregoing reasons the appeal should be dismissed or, in the alternative, the judgment of the Supreme Court of New Jersey be affirmed.

Respectfully submitted,

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